IN THE SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1899.

No. 207.

THE UNION REFRIGERATOR TRANSIT COMPANY,
PLAINTIFF IN ERROR,

vs.

STEPHEN H. LYNCH, TREASURER OF SALT LAKE COUNTY, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF UATH.

BRIEF OF DEFENDANT IN ERROR.

Plaintiff in error urges two points for the reversal of this case. These we will consider separately. The first contention is that the cars of the plaintiff in error under the admitted facts of the complaint acquired no situs in Utah for purposes of taxation. As to this we answer that it has been settled by repeated decisions of this court that, to use the language of Mr. Justice Shiras, in American Refrigerator Transit Co. v. Hall, 174 U. S., page 82:

> "Where a corporation of one state brings into another to use and employ a portion of its movable personal property, it is legitimate for the latter to impose upon such property thus used and employed, its fair share of the burdens of taxation imposed upon the same property used in a like way by its own citizens. We think that such a tax may be

> assessed and collected in cases like the present, where the specific and individual items of property so employed were not continuously the same but were constantly changing according to the exigencies of the business, and that the tax may be fixed by an appraisement and valuation of the average amount of the property thus habitually used and employed."

Other authorities to the same effect are:

Pullman Palace Car Co. vs. Pennsylvania, 141 U. S. 18.

Marye vs. Baltimore & Ohio R. R. Co., 127 U. S. 117.

Adams Express Co. vs. Ohio, 165 U. S. 194.

Adams Express Co. vs. Ohio, 166 U. S. 185.

Western Union Telegraph Co. vs. Massachusetts, 125 U. S. 530.

Pullman Palace Car Co. vs. Board of Assessors, 55 Federal Reporter, 206.

We contend that the facts of this case bring it squarely within the rule above announced.

But counsel for plaintiff in error attempt to distinguish this case from Pullman Palace Car Company vs. Pennsylvania, and American Refrigerator Transit Company vs. Hall, *supra*, on the ground that the cars held taxable in these cases were habitually used in the states where the taxes were imposed. It is not perceived that the extent or frequency with which the plaintiff in error runs its cars into a state solely determines their situs for taxation there, nor that it is necessary, in order to make them subject to taxation, that it should have been in the habit habit of running a given number of them every day, or so many times a week or month. If plaintiff in error, in the usual course of business, is in the habit of running its cars into Utah whenever the needs of the business call them

there, in other words, whenever they are routed by shippers into and through that state, as is clearly shown by the complaint in this case to be the fact, we take it that some cars belonging to it, the average number used the year round in Utah are "habitually used and employed" in that state within the doctrine of the Pullman case and the American Refrigerator case, *supra*. The facts that Utah is less populous than Colorado and that a less number of refrigerator cars are needed to carry perishable freight to her markets or from her producers to markets outside the state, or that a less quantity of such freight is transported through that state than through Colorado, or that the business of plaintiff in error for any one of a variety of reasons may be less extensive in Utah than was the business of the American Refrigerator Company in Colorado, do not change the principle involved. If it is a part of plaintiff's business to employ and use its cars in and through Utah and this is done whenever occasion exists and there is a demand for them there, then whether the average number employed be four hundred, or forty, or only four, that number are properly taxable in the state.

If we have correctly apprehended the principle laid down by this court in the authorities above referred to, it is not the number of cars used or the number of trips they make in and through a state that is the test of their liability to taxation therein. It is the fact that the property of a corporation such as an Express Co., or Sleeping Car or Refrigerator Car Co. whose business extends through a number of states may be properly valued for taxation as a unit, taking into consideration not only its tangible property but also the uses of that property, the extent of the business, and all other elements going to make up the aggregate value of the plant as a whole and that a just portion of such tax may properly be exacted by each state

through which the business extends, and in which a part of it is transacted and a portion of the corporate property used and employed, for the reason that the corporate property, considered as a unit, derives value from the use of it in each of such states and its business is protected and conserved by their laws.

Adams Express Co. vs. Ohio, 165 U. S., page 220-221.

Same case, 166 U. S. pp. 223-224.

American Refrigerator Transit Co. vs. Hall, 174 U. S 70.

The complaint shows that the plaintiff in error was doing business in Utah during 1897, the year for which the tax in question was levied, and that it was running its cars into and through the state, using and employing them there for profit, evidently in the same manner as in other states. The facts alleged in the complaint as to the ownership, control, and method of use and management of the cars of plaintiff in error in Utah are identical with those set forth with respect to the cars of the American Refrigerator Co. in Colorado, in 174 U. S. *supra.*

The complaint further shows that on August 14, 1897, the State Board of Equalization of Utah assessed and valued of the property of the plaintiff in error, ten cars of the aggregate value of $2600 for all purposes of county and state taxation for the year 1897, and thereafter "apportioned the said assessment to the several counties in the State of Utah through which lines of railway pass and over which the said cars might pass or be transported;" and that $210 of said assessment was apportioned to Salt Lake County. No objection is urged or complaint made that this assessment is unreasonable or unjust in respect either to the amount of property or the valuation

placed thereon; neither is the method of apportionment objected to. It must then be assumed, that if the cars of plaintiff in error are subject to taxation in Utah at all, the amount of the tax in the case at bar furnishes no just ground of complaint. This court has already decided, as above stated, that in cases where the specific and individual items of property used and employed were not continuously the same but were constantly changing according to the exigencies of the business, the tax may be fixed by an appraisement and valuation of the average amount of the property which is habitually used and employed.

American Refrigerator Transit Co. vs. Hall, *supra.*

In the case at bar, the cars of the appellant were constantly changing but, on the average, there were some cars in Utah continuously throughout the year. Plaintiff in error has not complained that too many cars were assessed or that they were assessd too much, but simply complains that it cannot be taxed at all. It is not necessary that a definite number must be in the state continuously; it is sufficient that, on an average, the assessed value is there.

Let us take an illustration; suppose plaintiff in error had one thousand cars come into Utah in February, stay three days and go out; suppose five hundred of these cars come into the state in July, stay four days and go out; suppose six hundred cars come into the state in November, stay ten days and go out; it is apparent that on the average, plaintiff has had a certain number of cars in the State of Utah continuously for the year, taking the whole number of cars as a basis. Now the average number in the State of Utah is presumed to have a situs there under the cases heretofore cited and the principles therein stated. The actual number that have a situs there continuously,

under the foregoing principles should be taxed and contribute their proportionate amount to the protection that all property receives in the state. In the words of Chief Justice Fuller in Adams Express Co. vs. Ohio, 165 U. S. on page 220:

> "Corporations and companies engaged in interstate commerce should bear their proper proportion of the burdens of the governments under whose protection they conduct their operations, and taxation on property collectible by the ordinary means, does not affect interstate commerce otherwise than incidentally, as all business is affected by the necessity of contributing to the support of government."

We further urge that, it being a well settled principle that public officers are presumed to do their duty and that official action will be taken to be correct and regular where nothing appears to the contrary, it is a just inference from the pleadings here that the number of cars assessed by the State Board of Equalization, to-wit: ten, was the average number used and employed by the plaintiff in error in the State of Utah during the year 1897. It is nowhere alleged that any other or incorrect basis of assessment was adopted. It cannot be disputed that the one above set forth is correct. We submit that this is a case where the presumption is plainly applicable.

How, then, can this case be distinguished from American Refrigerator Co. vs. Hall, *supra?* There the cars were owned, used, managed, and controlled in precisely the same way as here. There, as here, it was a part of the car company's business, out of which it made a profit, to use and employ its cars for carrying freight in and through the state. There, as here, the individual cars used were not continuously the same but were constantly changing as the needs of the business and the convenience of the company and its patrons required. And there, as here, there

were on an average, constantly in the state a given number of cars of the car company. And in that case this court held that such average number were lawfully taxable by the state.

Counsel for plaintiff in error asks whether cars are taxable wherever they happen temporarily to stray and whether the rule for which we contend, applies also to car owners who also operate railroads. We answer that cars are not taxable wherever they happen to stray temporarily but that, where a foreign corporation does business and employs a portion of its personal property, whether it be cars, engines, or what not, continuously in a state, that property is taxable there. And this is true whether the corporation be the owner of a stage line, a sleeping car or refrigerator car line, or a railroad.

Plaintiff in error cites Fargo vs. Michigan, 121 U. S. 230, contending that the situation of the cars here in question is the same as that of the cars which were part of the property of the Transportation Company in that case. That case is sufficiently distinguished by the fact stated in counsel's brief, that the tax there was levied upon gross receipts and not upon property; and thus falls within the rule announced by Chief Justice Fuller in Adams Express Co. vs. Ohio, 165 U. S. on page 220:

> "Although the transportation of the subjects of interstate commerce or of *receipts* received therefrom or the occupation or business of carrying it on, cannot be directly subject to state taxation, yet property belonging to corporations or companies engaged in such commerce may be; and whatever the particular form of the exaction if it is essentially only property taxation, it will not be considered as falling within the inhibition of the constitution."

It may further be noted that, in the foregoing case, the complainants bill showed:

> "Fourth, that the said Transportation Company during the said year was not running or interested in any special, fast, through or other stock, coal, or refrigerator car freight line, or doing business in, or running cars over any of the railroads in said State of Michigan otherwise than as in the preceding paragraphs stated."

The plaintiff in error also cites Crandall vs. Nevada, 6 Wallace, 35. In this case, however, the tax was held unconstitutional because levied on each person passing through or leaving the State of Nevada. In Robinson vs. Longley, 18 Nevada, 71, a circus was brought into Nevada and the court in the opinion finds that it came from another state with the intention of passing from Nevada into another state, which it actually did, and the court holds that the case is identical with one where a person simply travels through one state on his way into another. The property was only temporarily and transiently in Nevada for a brief period "on the wing."

If Robinson had divided up his circus and kept half of it in Nevada for a year exhibiting it, or if he had had one-half of it in the state for half the year and then sent it out and brought the other half in and kept it there the remainder of the year, we submit that he would have been properly taxable by Nevada upon the value of one-half of his circus.

Here, while individual items of plaintiff's property were in Utah only for brief periods of time, yet a portion of its property considered as a whole, a fraction of it, was in the state throughout the year.

Robinson vs. Longley as also Central R. R. vs. State Board, 49 N. J. Law 11, and Bain vs. Railroad, 105 N. C. 363, which are opposed to Pullman Palace Car Co. vs. Pensylvania and American Refrigerator Co. vs. Hall, *supra*, were cited to this court by counsel for plaintiff in error in

the latter case. Philadelphia S. S. Co. vs. Pennsylvania, 122 U. S. 326, is distinguishable for the same reasons as Fargo vs. Michigan, *supra*. The case of Brown vs. Maryland, 12 Wheaton 449 concerned a license tax upon the business of importing and is obviously not in point.

The case of State vs. Stephens, 146 Missouri, 662 is also relied on by the plaintiff in error. The portion of the opinion of Judge Marshall containing views sustaining plaintiff's contention, is not concurred in by the remainder of the court. On the contrary, five out of the seven judges place their concurrence in the judgment expressly upon another ground. State vs. Engle, 34 N. J. Law 425, is also readily distinguishable as the property there attempted to be taxed was only in the state temporarily and in transit.

As to the second assignment of error, counsel for plaintiff concedes that the fact that its property is engaged in interstate commerce does not exempt it from state taxation and that if the cars taxed had a situs in Utah for purposes of taxation, then the tax is not an interference with inter-state commerce.

The third assignment of error challenges the sufficiency of the statutes of Utah, to authorize the imposition of the tax. While this point has not been adverted to in the brief for plaintiff in error, and might therefore be assumed to be waived, we will briefly discuss it.

It was contended for plaintiff in error in the court below that the laws of Utah contemplate that only such property shall be taxed as is connected with a railroad line or such property as is owned or controlled and operated by a railroad company which owns or uses a railroad line and that, where cars are operated and used in interstate commerce even though they are within the State of Utah a considerable portion of the time, that the legislative lan-

guage is not apt to tax such property because the same is not connected with and used by the company that operates and controls the railroad line, meaning by line the realty that is necessary to operate a line of railroad as distinguished from the rolling stock.

The Constitution of Utah, Article XIII, Section 2, Revised Statutes of Utah, page 61, provides, in substance, that all property in the State, not exempt, shall be taxed in proportion to its value, that value to be ascertained as provided by law. And Section 10 of the same article, Revised Statutes of Utah, page 63 provides:

> "All corporations or persons in this state, or doing business herein, shall be subject to taxation for State, County, School, municipal or other purposes on the real or personal property owned or *used* by them within the territorial limits of the authority levying the tax."

No question was made, nor could well have been made, but that this language isnot only adequate but apt to impose a tax upon plaintiff's property but it was contended that the language of the legislature was not apt for this purpose. The law of Utah, in force at the time this tax was levied, is found in the Laws of 1896, page 423, Section 1, pages 439-40, Section 55-56. Section One provides, in substance, the same as the constitution so that here the language is both apt and adequate.

Turning to Section 55 it will be noticed:

1st.—That all that is provided by this section is the manner of ascertaining the property to be taxed and that, for this purpose, certain officers of certain companies are designated as the ones that shall furnish to the State Board of Equalization a sworn statement as to the property and the value of the property owned and controlled by their

respective companies, as a basis of valuation. It will be noticed that, in this section, no tax is imposed nor is any authority given to impose any tax, but the whole section is directed to one single point, that of conveniently ascertaining what property shall be assessed and made the subject of taxation. Counsel for plaintiff in error made the point in the lower court that there is no punctuation between the words "street railway" and "car". But very little attention is ever given to punctuation in interpreting the law. On this point we site, Sutherland on Statutory Construction, Section 232. There is no doubt but that there should be a comma between "street railway" and "car" and, read in this way, we should have "railroad line", "street railway line", "car line", etc. But it was contended that this means a physical line, a line having a physical unity, such as the realty that composes the line of railway between two points. We do not think the Legislature intended any such narrow construction as this. A car line may be a great number of cars that are operated by a car company as a car line and yet the actual realty over which the rolling stock is run may not be owned by such company. It would be a very narrow and restricted construction to say that "car line" means that there is to be a physical unity instead of a unity of use and management. The Legislature meant that any car line is to furnish this record that has either a physical unity or a unity of use and management. And there is no question but that the line of plaintiff in error has a unity of use and management.

This meaning of the Legislature is made very clear by the concluding clause of Section 55, to-wit:

> "Any officer of a railroad, street railway, telegraph, or telephone line, railway depot, or car company, failing, on de-

> mand, to furnish the statement required of him shall be subjected to the penalty."

The court will notice from this quotation that it includes officers of *car companies*. The Legislature is referring to the identical thing that is mentioned in the first part of Section 55 and here it is, any car company that fails to furnish the statement is subject to the penalty. There is no question but that the appellant is a car company and there can be no doubt under this section that it is one of the companies required to furnish a sworn statement. It is to be presumed that the appellant obeyed the law and that it furnished a sworn statement as provided by law, of the number of its cars that came into the state, and obeyed the law in other respects.

Passing from Section 55, which deals merely with the statement that is to be furnished, we come to Section 56, and this is the section that provides for the assessment of the property so that even if Section 55 were to be eliminated, it would still leave in full force Section 56, as Section 55 is a mere convenience which Section 56 contains the *power* to assess. In this section it is provided:

> "At such meetings the board must assess all property and franchises of railroads, car, street railway, railway depot, and telephone and telegraph companies, but franchises derived from the United States must not be assessed.

From this language it will be seen that all "car" companies are to be assessed by the board. There cannot be a doubt that but plaintiff in error is a car company. The language of this section does not restrict or purport to restrict the assessment to domestic corporations; it includes both foreign and domestic corporations. It does not seem to us possible, without great verbiage, for a Legislature to express itself more clearly as to what shall be

assessed than is done in Section 56 which says, in so many words, that all property and franchises of *car companies* are to be assessed. This exact question under a similar statute in Colorado was decided adversely to the contention of plaintiff in error, in American Refrigerator Transit Co. vs. Hall, *supra;* reported in the court below in 51 Pacific Reporter, 421. With respect to exemptions from taxation, the law is well settled that:

> "Every such immunity must receive a strict construction. Legislation which is claimed to relieve any species of property from its due proportion of the general burdens of government, should be so clear that there can be no reasonable doubt or controversy about its terms. The language must be such as leaves no room for discussion. Doubts must be resolved against the exemption."
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> Sutherland on Statutory Construction, Section 364.

The case of Marye vs. Baltimore & Ohio R. R. Co., 127 U. S. 117, was cited by plaintiff in error. That case is not in point for the reason that the court states that the language used and other expressions contained in the law taken as a whole show that it was intended to apply to domestic corporations only, and to no others. Taking the general language of the Utah Constitution and of the law, we submit that it was clearly intended to apply to every person, company, and corporation owning or using property in the state.

It is respectfully submitted that the judgment of the Supreme Court of Utah was right and should be affirmed.

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